No. 80-2043

Office - Supreme Court, U.S.
FILED
DEC 31 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

BOARD OF EDUCATION, ISLAND TREES UNION FREE SCHOOL DISTRICT NO. 26; RICHARD AHRENS, FRANK MARTIN, CHRISTINA FASULO, PATRICK HUGHES, RICHARD MELCHERS, RICHARD MICHAELS, and LOUIS NESSIM,

Petitioners,

against

STEVEN A. PICO, by his next friend, FRANCES PICO; JACQUELINE GOLD, by her next friend, RONA GOLD; RUSSELL RIEGER, by his next friend, SAMUEL RIEGER; GLENN YARRIS, by his next friend, RICHARD YARRIS and PAUL SOCHINSKI, by his next friend, HENRY SOCHINSKI,

Respondents.

AMICUS CURIAE BRIEF OF THE AMERICAN LIBRARY ASSOCIATION THE NEW YORK LIBRARY ASSOCIATION AND THE FREEDOM TO READ FOUNDATION

DON H. REUBEN
JAMES A. KLENK
JOAN F. POLACHECK
Attorneys for the American Library Association, the New York Library Association, and the Freedom to Read Foundation

Of Counsel:
REUBEN & PROCTOR
19 South LaSalle Street
Chicago, IL 60603
(312) 558-5500

Pandick Press Midwest, Inc., Chicago • 454-7600

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AMICUS CURIAE BRIEF OF THE AMERICAN LIBRARY ASSOCIATION, THE NEW YORK LIBRARY ASSOCIATION AND THE FREEDOM TO READ FOUNDATION

The American Library Association, the New York Library Association and the Freedom to Read Foundation submit this Brief *Amicus Curiae.* All of the parties to this cause, through their counsel, have consented to this filing; their written consents have been filed with the Clerk pursuant to Rule 36.

STATEMENT OF INTEREST

The American Library Association ("ALA") is the oldest and largest library association in the world and is chief spokesman for the modern library movement in this country. The ALA's membership includes more than 39,000 libraries, librarians, library trustees, and members of the public. Through its affiliation with constituent state library associations, ALA represents over 29,000 public, university and special libraries, over 90,000 elementary and secondary school libraries and media centers, and over 120,000 librarians. The New York Library Association ("NYLA"), a chapter of ALA, has served for nearly 90 years as the chief proponent of library service in the State of New York. Its membership includes over 3,500 libraries, librarians, library trustees, library administrators and members of the public.

The Freedom to Read Foundation, a non-profit organization supported by voluntary donations, was established in 1969 by the American Library Association to promote and defend First Amendment rights; to foster libraries as institutions wherein every citizen's First Amendment freedoms are fulfilled; to support the right of libraries to include in their collections and make available any work which they may legally acquire; and to set legal precedent for the freedom to read on behalf of all citizens.

Amici are vitally committed to the preservation of the American library as a resource indispensable to the intellectual, cultural, and educational welfare of the Nation.

ISSUES ADDRESSED IN THIS BRIEF

We will not repeat the arguments of the parties. Rather we will focus on two key points that Appellants have overlooked. First, Appellants' Brief treats this case as if curricular decisions

were in issue. (Appellants' Brief at 13-21, 29-33.) This case, however, is about a *library*, not a school's curriculum. This is an extremely important distinction for the evaluation of the First Amendment interests at stake here.

Second, nowhere in the papers before the Court do the parties discuss a standard for federal jurisdiction in these cases. A standard is necessary because this Court's decisions make clear that the First Amendment does limit a school board's actions. *E.g., Epperson* v. *Arkansas*, 393 U. S. 97, 104-05 (1968); *Tinker* v. *Des Moines Indep. Comm. School Dist.*, 393 U. S. 503, 506-07 (1969). We believe that this case presents an opportunity for articulating a standard for judicial review of cases involving censorship of school libraries.

ARGUMENT

I.

THE LIBRARY EXISTS TO PRESENT AND PRESERVE ALL POINTS OF VIEW.

The school board below banned books from a library. Thus, this case does *not* present an issue concerning the board's control of curriculum, *i.e.* what is taught in the classroom. We freely concede that the school board has the right and duty to supervise the general content of the school's course of study. However even in the classroom, school board authority, albeit plenary, must give way and yield when there is a pattern of suppression of fundamental rights. *Epperson* v. *Arkansas*, 393 U. S. at 104-105; *Meyer* v. *Nebraska*, 262 U. S. 390 (1923). As a corollary, outside of the classroom, school board discretion is far more circumscribed because the board's prerogatives are less and the individual's rights are greater. *Tinker* v. *Des Moines Indep. Community School Dist.*, 393 U. S. 503 (1969); *Zykan* v. *Warsaw Community School Corp.*, 631 F. 2d 1300, 1305 (7th Cir. 1980) ("control of matters not immediately affecting classroom activities is subject to numerous qualifications").

To the extent that there is judicial deference to the board's control over the classroom and hallways, that accommodation is based on the role of the schools in teaching the basic values of our society. *See, e.g., East Hartford Ed. Ass'n.* v. *Board of Education*, 562 F.2d 838, 859 (2d Cir. 1977) (en banc). Given the electoral process, the community values or standards that find their way into the curriculum are in the main those of the majority, and there is little a court can effectively do (save in the outrageous case) to ensure a minority voice. But while majority rule may be permissible, within constitutional limits, in setting the curriculum and governing the classroom, majority rule dictating the contents of a library is antithetical to the very concept of a society with many voices.

The library has rightly and traditionally been regarded as an "open port," a free marketplace of ideas, popular and unpopular. *Minarcini* v. *Strongsville City School Dist.*, 541 F. 2d 577, 582 (6th Cir. 1976). To whatever degree the classroom, or other government activities or decisions have become vehicles for social, political, cultural, economic or religious indoctrination and propaganda, the library has served as an intellectual armory, supplying facts, concepts and the widest spectrum of knowledge to all without fear or favor. The *raison d'etre* of the library is to serve, present, and preserve all points of view, not just those of the majority. The library, unlike the school curriculum, simply does not exist primarily to teach the majority's values or to socialize the child.

The school library in particular has been recognized as "a mighty resource in the free marketplace of ideas." *Minarcini, supra*, 541 F. 2d at 582. As the Court observed in *Right to Read Defense Comm. of Chelsea* v. *School Comm.*, 454 F. Supp. 703, 715 (D. Mass. 1978):

> [A] student can literally explore the unknown and discover areas of interest and thought *not covered by the prescribed curriculum.* The student who discovers the magic of the library is on the way to a life-long experience of self-education and enrichment. That student learns that a library is a place to test or expand upon ideas presented to him, in or out of the classroom.
>
> The most effective antidote to the poison of mindless orthodoxy is ready access to a broad sweep of ideas and philosophies. There is no danger in such exposure. The danger is in mind control.

See Keyishian v. *Board of Regents*, 385 U. S. 589, 603 (1967) ("[t]eachers and students must always remain free to inquire, to study and evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die").

Appellees are not attempting to force anyone to read, use, or purchase the books at issue. Rather, they only are asking

that the existing books remain available on the library shelf and not be censored by removal because a group of public officials do not approve of their content. Such censorship in a library —and especially a school library—cuts at the heart of the First Amendment.

> As this Court held in *Tinker, supra,* 393 U. S. at 511:
>
> In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved.

If students know that some books are banned from a school library because of their content, the message is clear that government has declared that the ideas expressed in those books are taboo. Our First Amendment values and tradition of freedom of thought reject such conduct by government.

II.

PUBLIC OFFICIALS MAY NOT BAN BOOKS ON THE BASIS OF THEIR CONTENT.

Few courts have addressed the issue of content-based book banning in school libraries, and those that have done so diverge concerning the standard for a federal court to hear and decide a case like this. *Compare Zykan* v. *Warsaw Community School Corp.,* 631 F. 2d 1300, 1308 (7th Cir. 1980) (court must step in to prevent imposition of orthodoxy) *with Minarcini* v. *Strongsville City School District,* 541 F. 2d 577, 582 (6th Cir. 1976) (removal based on content violates First Amendment) *and* the panel majority below. But all agree that at some point a federal forum must be available to act and protect the First Amendment.

We believe and urge that those who use the library state a federal claim when they plead facts sufficient to show that the constituted authority removed a book that is not in law illegal (*i.e.*, obscene or otherwise outside the protection of the First Amendment) from a library to suppress the ideas in that book. This standard is firmly rooted in First Amendment principles of robust debate and does not burden the Courts with garden-variety, back-fence disputes over local affairs.

A public official cannot ban a publication simply because he does not like the ideas expressed in it. Such conduct is antithetical to a free society and is a reincarnation of Milton's licensor. *Lovell* v. *Griffin,* 303 U. S. 444, 451 (1938). A totalitarian government always restricts newspapers, regulates the use of printing equipment, and controls radio and television broadcasts. Indeed, these were among the very first acts of the Polish authorities last month. *See, e.g.,* "Martial Law—What it Means in Poles' Lives," *Chicago Sun-Times,* December 15, 1981, page 6.

The philosophy espoused by Appellants of purging all works that are in some way inconsistent with "community values" has resulted in such aberrations as the burning of Dante's Divine Comedy by the Florentines, the suppression of Galileo's Dialago in Rome, and the banning of Twain's The Adventures of Huckleberry Finn as "trash and suitable only for the slums." A. Haight & C. Grannis, *Banned Books 387 B.C. to 1978 A.D.* (1978). Unfortunately, from colonial days books have been attacked and sought to be suppressed in this country as well as in dictatorships; one of the early heritages acquired from across the sea was the practice of censorship. Indeed, the First Amendment was adopted because of this noxious practice and the seditious libel trials that ensued; today, our government

cannot outlaw writings because the publications are not in favor with the authorities, *i.e.*, this very case. *See New York Times Co.* v. *United States*, 403 U. S. 713, 715-717 (1971); *Lovell* v. *Griffin*, 303 U. S. 444, 451-452 (1938).

Library collections must have range, depth and continuity over time to serve their high purpose. Purging a library collection of books offensive to the majority, as Appellants urge, robs the library of its fundamental nature and has the same chilling effect on the "free marketplace of ideas" as outright censorship of newspapers and radio. The purge in the name of the child fetters the First Amendment's liberty of circulation which this Court, time and again, has held "is as essential to that freedom as liberty of publishing; indeed, without the circulation, the publication would be of little value." *Lovell* v. *Griffin*, 303 U. S. at 452.

Freedom of speech and press includes "not only the right to utter or to print, but . . . the right to receive, the right to read . . . and freedom of inquiry [and] freedom of thought, . . ." *Griswold* v. *Connecticut*, 381 U. S. 479, 482 (1965); *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U. S. 748 (1976). The library is a principal place in our society where one can go to explore and find almost every idea imaginable to exercise these rights. The First Amendment necessarily protects the library collection as the primary source of what is received and can be read, the repository of the knowledge and ideas that sustain inquiry and thought.

Freedom of inquiry is especially important for the children who are school library users. The school board below must heed this Court's admonition in *West Virginia* v. *Barnette*, 319 U. S. 624, 637 (1943):

> That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.

The child whose inquiries lead him to explore beyond the curriculum should not have any avenues of inquiry foreclosed.

Curiosity is to be encouraged, not suppressed. If we cannot teach our children by example to protect and respect First Amendment values, then we will indeed "strangle the free mind at its source."

That a book may be available elsewhere does not mitigate the First Amendment violation. Restraint on expression cannot be justified by the availability at other times and places of opportunities for such expression. *Southeastern Promotions, Ltd.* v. *Conrad,* 420 U. S. 546, 556 (1975); *Schneider* v. *State,* 308 U. S. 147, 163 (1939). As stated in *Right to Read Defense Committee of Chelsea* v. *School Comm.,* 454 F. Supp. 703, 714 (D. Mass. 1978):

> If this work may be removed by a committee hostile to its language and theme, then the precedent is set for removal of any other work. The prospect of successive school committees "sanitizing" the school library of views divergent from their own is alarming, whether they do it book by book or one page at a time.
>
> What is at stake here is the right to read and be exposed to controversial thoughts and language—a valuable right subject to First Amendment protection.

The bright-line standard we urge here would not burden the Courts. Even before this case, the impact of book banning cases on the federal case load was miniscule; for the twelve-month period ending June 30, 1980, 168,754 civil cases were filed in the federal courts. *1980 Annual Report of the Director* 54 (Administrative Office United States Courts). Yet, over the last *ten years* there have been less than twenty reported decisions in cases such as here.

We do not suggest that a book can never be removed from a library. Once a book has been placed on a shelf someone has made the determination that the book has value—the state has

paid money to acquire it. But lack of shelf space, obsolescence, and even possibly improper procurement are all legitimate reasons, among others, for removal. As in any civil rights action, a good faith defense would apply and the removal of a book for non-content related reasons plainly insulates state action from the federal court.

Finally, the standard we urge here fully accommodates the community's interest in inculcating civic values since it does not involve federal judicial review of curriculum. But, if there is any question about the propriety of a publication on the library shelves, in limited circumstances a less suppressive alternative should be sought, such as restricted shelving with access upon parental consent. Exclusion of the book from the library, as occurred below, is never a solution that is either palatable or permissible under our Nation's strongly held First Amendment beliefs.

CONCLUSION

A library, unlike the school curriculum, does not exist to indoctrinate. Rather, the library is a precious resource, a fountainhead of knowledge, and knowledge is the key to our democracy. James Madison, who chaired the committee that drafted the First Amendment, recognized this when he wrote

> A popular government, without popular information or the means of acquiring it, is but a prologue to a farce or tragedy; or, perhaps, both. Knowledge will forever govern ignorance; and a people who mean to be their own governors, must arm themselves with the power which knowledge gives.[1]

To allow banning of books by school boards based on the ideas expressed in those books would violate the core purpose of the First Amendment and the very purpose of the library as a "mighty resource in the marketplace of ideas."

For the reasons set forth above, the judgment of the Court of Appeals should be affirmed and the case remanded for trial.

Respectfully submitted,

DON H. REUBEN
JAMES A. KLENK
JOAN F. POLACHECK
Attorneys for the American Library Association, the New York Library Association and the Freedom to Read Foundation

Of Counsel:
REUBEN & PROCTOR
19 South LaSalle Street
Chicago, IL 60603
(312) 558-5500

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[1] James Madison, letter to W. T. Barry, Aug. 4, 1822, in *The Complete Madison* (New York: Harper, 1953) p. 337.